A

BERJAYA TIMES SQUARE SDN BHD

v.

M-CONCEPT SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
RAUS SHARIF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: W-02-546-2004]

C

11 MAY 2009

CONTRACT: *Breach - Building contract - Agreement for sale of shop-lot in building - Vendor unable to deliver vacant possession by specified time - Whether purchaser entitled to rescind agreement, recover moneys*

D

paid and claim damages - Whether provision for liquidated damages for late delivery disentitled purchaser from rescinding agreement - No provision on rescission in agreement, whether consequential - Purchaser continuing to make instalment payments, whether a waiver of right to rescission - Contracts Act 1950, s. 56(1)

E

CONTRACT: *Rescission - Building contract - Agreement for sale of shop-lot in building - Vendor unable to deliver vacant possession by specified time - Whether time of essence of agreement - Whether purchaser entitled to rescind agreement, recover moneys paid and claim damages -*

F

Whether provision for liquidated damages for late delivery disentitled purchaser from rescinding agreement - No provision on rescission in agreement, whether consequential - Purchaser continuing to make instalment payments, whether a waiver of right to rescission - Whether purchaser stopped from rescinding agreement - Contracts Act 1950, s. 56(1)

G

CONTRACT: *Rescission - Consequences, of - Contracts Act 1950 s. 65 - Option of innocent party to rescind contract and sue for damages - Outstanding obligations need no longer be performed by either party*

H

EQUITY: *Maxims of equity - He who comes into equity must come with clean hands - Whether conformed with - Whether party in breach of contract can claim innocent party estopped from rescinding contract*

I

By way of a sale and purchase agreement dated 24 August 1995 ("agreement"), the plaintiff/respondent purchased at the price of RM1,149,771 a commercial shop lot ("the property") developed by the defendant/appellant. By cl. 22(1) of the agreement, the defendant was required to deliver vacant possession of the

property to the plaintiff 36 months from the date of the agreement ("the completion date") and there was also an automatic extension of three months from the expiry of the completion date ("the extended period"). The property was not completed nor delivered to the plaintiff by the extended period. The plaintiff had paid the full purchase price of the property. Upon the plaintiff's notices of intention to terminate the agreement, the defendant had twice promised to complete and deliver the property at later dates but all these promises came to nought. In fact, on 20 March 2003 when the plaintiff filed the originating summons seeking for a declaration that the plaintiff had rescinded the agreement together with the other reliefs, the defendant had still failed to deliver vacant possession of the property. On 30 June 2003, the property was completed and ready for delivery of vacant possession. The defendant claimed that the plaintiff could not rescind the agreement but could only claim liquidated damages. The issue before the court was whether the failure by the defendant to deliver vacant possession of the property on or before the completion date constituted a fundamental breach of the contract which entitled the plaintiff to rescind the agreement. The learned High Court judge answered the question in the affirmative and allowed the plaintiff's claim. Hence this appeal.

Held (dismissing the appeal with costs)
Per Zaleha Zahari & Raus Sharif JJCA:

(1) The defendant's failure to deliver vacant possession rendered the agreement voidable. The plaintiff therefore had an option under s. 56(1) of the Contracts Act 1950 ("the Act") either to continue with the contract or to rescind it. Even though the agreement did not expressly provide for the plaintiff's right to terminate it, this did not take away the plaintiff's right to do so under s. 56(1) when the defendant had clearly committed a fundamental breach by failure to complete and deliver vacant possession within the stipulated period. Similarly, the plaintiff's entitlement to liquidated damages for any delay in delivery of vacant possession did not take away the plaintiff's right to rescind and terminate the agreement. (paras 13 & 17)

(2) The argument that the plaintiff was *estopped* from rescinding the agreement because the plaintiff had chosen not to terminate or rescind the agreement immediately after the alleged breach but had made progressive payments was

without merit. *Estoppel* is an equitable doctrine. It can only be invoked by the party who comes to court with clean hands. The defendant did not come to court with clean hands to rely on the doctrine. The defendant had clearly breached its contractual obligation. (paras 19 & 20)

Per Abdul Malik Ishak JCA:

(1) Time was the essence of the contract, and there was delay on the part of the defendant to deliver vacant possession of the property. The delay was far too excessive and could not be tolerated. (para 59)

(2) Section 56(1) of the Act must be read together with s. 65 of the Act which provides for the consequences of rescission of a voidable contract. The innocent party or the party who is not in default may put an end to the contract - in the sense that any obligations then outstanding need no longer be performed by either party, and the innocent party too may sue for damages for any loss suffered as a result of the defaulting party's non-performance. The plaintiff here had done just that. The plaintiff was also entitled to post-rescissionary damages. (paras 59, 64 & 72)

Bahasa Malaysia *Translation Of Headnotes*

Melalui satu perjanjian jual beli bertarikh 24 Ogos 1995 ('perjanjian tersebut'), plaintif/responden telah memperolehi sebuah shop lot komersial ('hartanah tersebut') pada harga RM1,149,771 yang dibangunkan oleh defendan/perayu. Melalui kl. 22(1) perjanjian tersebut, defendan dikehendaki menyerahkan milikan kosong hartanah tersebut kepada plaintif dalam masa 36 bulan dari tarikh perjanjian ('tarikh penyelesaian') dan juga terdapat tempoh lanjutan automatik tiga bulan dari tarikh habis tempoh ('tempoh lanjutan'). Hartanah tersebut gagal disiapkan serta tidak diserahkan kepada plaintif dalam tempoh-tempoh yang diberi walaupun plaintif telah membuat bayaran harga penuh hartanah tersebut. Berdasarkan notis-notis yang telah diberi plaintif untuk menamatkan perjanjian tersebut, defendan telah beberapa kali berjanji untuk menyiapkan dan menyerahkan hartanah tersebut pada tarikh-tarikh lain tetapi telah memungkiri janji-janji yang diberi. Seterusnya, pada 20 Mac 2003, apabila plaintif memfailkan saman pemula memohon satu deklarasi bahawa plaintif telah membatalkan perjanjian, defendan masih gagal menyerah milikan kosong hartanah tersebut. Pada tarikh 30 Jun 2003, tanah tersebut disiap selesai dan bersedia

untuk penyerahan milikan kosong. Menurut defendan, plaintif tidak dibenarkan untuk membatalkan perjanjian tersebut tetapi hanya berhak menuntut ganti rugi jumlah tertentu. Isu yang timbul adalah sama ada kegagalan defendan menyerah milikan kosong tanah tersebut pada atau sebelum tarikh penyelesaian adalah satu kemungkiran asasi perjanjian yang memberi hak kepada plaintif untuk membatalkan perjanjian tersebut. Hakim Mahkamah Tinggi telah menjawab soalan ini secara afirmatif dan membenarkan rayuan plaintif. Oleh itu, perayu telah membuat rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Zaleha Zahari & Raus Sharif HHMR:

(1) Kegagalan defendan untuk menyerah milikan kosong telah menyebabkan perjanjian tersebut dibatalkan. Plaintif mempunyai opsyen di bawah s. 56(1) Akta Kontrak 1950 ('Akta itu') untuk menyambung perjanjian atau membatalnya. Walaupun perjanjian tidak mensyaratkan bahawa plaintif berhak untuk membatalkan perjanjian tersebut, ini tidak mengambil hak plaintif untuk berbuat demikian di bawah s. 56(1) apabila defendan telah secara terang-menerang melakukan kemungkiran fundamental dengan kegagalannya untuk meyiap sediakan dan menyerah milikan kosong hartanah tersebut dalam tempoh masa yang diberi. Hak plaintif untuk menuntut ganti rugi jumlah tertentu untuk kelewatan penyerahan milikan kosong tidak mengambil hak plaintif untuk membatal dan menamatkan perjanjian.

(2) Hujahan bahawa plaintiff diestop daripada membatalkan perjanjian tersebut sebab plaintif tidak menamatkan perjanjian dengan segera selepas kemungkiran defendan tetapi telah membuat bayaran secara progresif tidak mempunyai merit. *Estoppel* adalah doktrin ekuiti. Ia hanya boleh digunakan oleh pihak yang datang ke mahkamah dengan tangan yang bersih. Defendan di dalam kes ini tidak datang ke mahkamah dengan tangan yang bersih untuk bergantung kepada doktrin ini. Defendan telah melanggar obligasi kontraktualnya.

Oleh Abdul Malik Ishak HMR:

(1) Masa adalah intipati perjanjian, dan telah berlakunya kelewatan dari pihak defendan untuk menyerah milikan kosong hartanah tersebut. Kelewatan tersebut adalah terlalu lama and tidak boleh dilayani.

(2) Seksyen 56(1) Akta tersebut patut dibaca dengan s. 65 Akta tersebut yang memperuntukkan mengenai akibat penamatan kontrak yang boleh batal. Pihak yang tidak bersalah boleh membatal perjanjian - dalam keadaan di mana obligasi yang belum dilaksanakan tidak perlu dilakukan oleh mana-mana pihak, dan pihak yang tidak bersalah boleh menuntut ganti rugi bagi apa-apa kerugian yang ditanggung akibat dari pihak yang telah melanggar kontrak. Plaintif di sini telah berbuat demikian. Plaintif juga berhak menuntut gantirugi pasca pembatalan.

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners) [1996] 3 CLJ 393 HC ***(refd)***

Chanter v. Hopkins [1838] 4 M & W 399 ***(refd)***

Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] 1 LNS 48 FC ***(refd)***

Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1988] 1 LNS 213 CA ***(refd)***

Cookson (Widow And Administratrix of the Estate of Frank Cookson, Decd) v. Knowles [1979] AC 556 ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Ganam Rajamany v. Somoo Sinnah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Hanson v. Radcliffe Urban District Council [1922] 2 Ch 490 ***(refd)***

Ismail Haji Embong v. Lau Kong Han [1970] 1 LNS 40 HC ***(refd)***

Jamshed Khodaram Irani v. Burjorji Dhunjibhai [1915] LR 43 IA 26 ***(refd)***

Lai Yew Seong v. Wong Chieu Gook [1913] FMS LR 125 ***(refd)***

Law Ngei Ung & Anor v. Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44 HC ***(refd)***

Lim Yee Khei v. Berjaya Times Square Sdn Bhd [2003] 1 CLJ 527 HC ***(refd)***

Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***

Muhammad Habidullah v. Bird and Company [1922] AIR 178 PC ***(refd)***

Photo Production Ltd v. Securicor Ltd [1980] AC 827 ***(refd)***

S Ayadurai v. Lim Hye [1959] 1 LNS 89 HC ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC ***(refd)***

Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Xavier Kang Yoon Mook v. Insun Development Sdn Bhd [1995] 2 CLJ 471 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 56(1), 65

Contract Act 1872 [India], s. 55

For the appellants - R Thayalan (VK Lashmi with him); M/s VK Lashmi & Co

For the 1st respondent - Rosli Dahlan (SC Cheah & TM Liew with him); M/s Lee Hishammuddin Allen & Gledhill

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S3-24-473-2003]

[Editor's note: For the High Court judgment, please see M-Concept Sdn Bhd v. Berjaya Times Square Sdn Bhd [2004] 4 CLJ 852.]

Reported by Amutha Suppayah

JUDGMENT

Zaleha Zahari & Raus Sharif JJCA:

[1] This is an appeal by the defendant against the decision of the learned High Court judge, Kuala Lumpur, given on 6 May 2004. We heard and unanimously dismissed the appeal with costs. We now give our reasons. But first the facts.

[2] On 24 August 1995, the plaintiff and the defendant entered into a sale and purchase agreement ("agreement") in respect of a property known as parcel No. 07-63 Commercial Shop Lot Berjaya Star City and now known as Berjaya Times Square ("property"). The plaintiff was the purchaser and defendant was the seller.

[3] The purchase price of the property was RM1,149,971 ("purchase price"). The plaintiff paid RM1,034,793.90 being 90% of the total purchase price to the defendant ("monies paid"), part of which was financed by a loan from AmBank Berhad.

[4] Under cl. 22(1) of the agreement, the completion date for the property was 36 months from the date of agreement (completion date). Under the same clause, there was an automatic extension of three months from the expiry of the completion date. The completion date of 36 months expired on 23 August 1998. The extended period of three months expired on 23 November 1998. However, the construction of the property was not completed and delivered to the plaintiff within the extended period or on or before 23 November 1998 as according to the agreement.

[5] After 23 November 1998, the plaintiff's director, Lee Teen Nguan, met the sales and marketing officers of the defendant; others Ms. Esther and Ms. Pey Yee, who promised that the construction of the property would be completed by the end of 2001. Again, the defendant failed to keep its promise.

[6] On 27 December 2001, the plaintiff's former solicitors, Messrs Gan & Low, issued a letter, informing the defendant that the plaintiff had decided to rescind the agreement. The reason to rescind being the defendant had committed a fundamental breach of its contractual obligation ie, to complete and deliver vacant possession of the property to the plaintiff on or before the completion date.

[7] The defendant refused to accept the recission of the agreement. In a letter dated 3 January 2002, the defendant claimed that the plaintiff was not entitled to rescind the agreement, instead would only be entitled to claim for liquidated damages.

[8] Subsequently, the plaintiff sought consent and obtained reassignment of all right, title and interest from AmBank to institute legal proceedings against the defendant.

[9] But on 1 October 2002, when the plaintiff's director, Lee Teen Nguan met the defendant's sales and marketing officer, Ms Dianne Chan, he was assured that vacant possession of the property would be delivered by end of 2002.

[10] Despite the assurance, the defendant again failed to complete and deliver vacant possession. As a consequence thereto, on 5 March 2003, the plaintiff's solicitors sent a letter demanding the defendant to accept the rescission of the agreement, to refund the monies paid and to pay all damages suffered by the plaintiff within 14 days.

[11] The defendant in letter dated 10 March 2003 disputed the plaintiff's right to rescind the agreement. Hence, the plaintiff filed this originating summons seeking the following orders:

(i) a declaration that the plaintiff had rescinded the agreement dated 24 August 1995 entered into between the plaintiff and the defendant *vide* a letter dated 27 December 2001 from the plaintiff's solicitors, Messrs Gan & Low to the defendant;

(ii) the defendant shall repay the plaintiff the sum of RM1,149,771 being the 100% of the purchase price already paid by the plaintiff to the defendant under the agreement;

(iii) the defendant shall pay the plaintiff a sum of RM241,820.99 as at 27 December 2001 being the financing costs, legal expenses and others incurred by the plaintiff for the purpose of purchasing the property;

(iv) the defendant shall pay the plaintiff all financing costs, legal expenses and others incurred by the plaintiff for the purpose of purchasing the property from 27 December 2001 till the date of the order where the damages would be assessed by the Senior Assistant Registrar;

(v) the defendant shall pay the plaintiff damages as a result of the defendant's breach of the agreement for a sum to be assessed by the Senior Assistant Registrar;

(vi) the defendant shall pay the plaintiff interest at the rate of 8% per annum on all sums to be paid from the date of the order to the date of full settlement;

(vii) cost of the application and incidental costs thereto be fixed on a solicitor client basis to be paid by the defendant to the plaintiff.

[12] The learned High Court judge granted the orders as prayed by the plaintiff. The main issue before the High Court as well as before us is whether the failure by the defendant to deliver vacant possession of the property on or before the completion date constitutes a fundamental breach of the contract which entitles the plaintiff to rescind the agreement. The learned High Court judge answered the question in the affirmative. He reasoned as follows:

> The failure of the defendant to deliver vacant possession of the property after 23 November 1998, as agreed under clause 22(1) of the agreement, for nearly 4 years and 4 months until the present originating summons was filed, amounts to a fundamental breach of the agreement by the defendant. The delay on the part of the defendant is excessive and unreasonable given the fact that the defendant was required to deliver vacant possession of the property to the plaintiff within 36 months from the date of signing of the agreement. As under the agreement time is essential, the failure on the part of the defendant to deliver vacant possession at the stipulated time renders the agreement voidable at the option of the plaintiff (see section 56(1) of the Contract Act 1950).

[13] We are of the same view. The defendant's failure to deliver vacant possession has rendered the agreement voidable. The plaintiff therefore had an option either to continue with the contract or to rescind it. Section 56(1) of the Contracts Act 1950, clearly gives the plaintiff that option. The section reads:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[14] The application of s. 56(1) of the Contract Act 1950 had been dealt with by the High Court in a number of cases. In *Tan Yang Long & Anor v. Newacres Sdn. Bhd.* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666, an identical application as in the present originating summons was filed and adjudicated by the High Court. In that case the agreement provides that the delivery of vacant possession of the property was to be on or before 17 March 1988. The defendant failed to comply with it. It was held by Shankar J (as he then was):

> The total failure of the defendant to give any credible assurances as to if and when the project would be completed amounted to a renunciation or abandonment of the agreement. Its conduct amounted to a fundamental breach of agreement.

In that case, it was argued by the developer that the only remedy available is a claim for liquidated damages instead of the termination of the agreement, but it was rejected by the court.

[15] Again, a similar issue was decided by Sibu High Court in favour of the purchaser in the case of *Law Ngei Ung & Anor v. Tamansuri Sdn. Bhd.* [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44. In that case, it was held by Chong Siew Fai J (as he then was) that:

> ... the defendant had in fact failed to complete the premises within the time stipulated in the agreement which made time of the essence of the agreement and the defendant's failure to complete the premises amounted to a renunciation or abandonment of the agreement and that the defendant had evinced an intention not to be bound by the agreement.

Further his Lordship stated:

> ... the agreement dated 17 October 1983 was rescinded as on 4 July 1986 by reason that the defendant had committed a fundamental breach of the agreement in that the defendant had failed to complete and deliver vacant possession.

[16] Abdul Malek bin Ahmad J (as he then was) in *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 LNS 213 and Abdul Malik bin Ishak J (as he then was) in *Xavier Kang Yoon Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471, decided similarly.

[17] We adopt the same approach. We hold that even though the agreement does not expressly provide for the plaintiff's right to terminate it, this would not take away the plaintiff's right to do so under s. 56(1) of the Contracts Act 1950, when the defendant had clearly committed a fundamental breach by failure to complete and deliver vacant possession within the stipulated period. Similarly, the plaintiff's entitlement to liquidated damages for any delay in delivery of vacant possession does not take away the plaintiff's right to rescind and terminate the agreement.

[18] There is a further point we must mention. It was argued that the plaintiff is estopped from rescinding the agreement because the plaintiff had chosen not to terminate or rescind the agreement immediately after the alleged breach. On the contrary, the plaintiff had, in fact, elected to make progressive payments and thus affirming the agreement.

[19] With respect, the argument is without merit. *Estoppel* is an equitable doctrine. It could only be invoked by the party who comes to court with clean hands (see *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] 1 LNS 48).

[20] On the facts of this case, we are unable to hold that the defendant came to the court with clean hands to rely on the doctrine. The defendant had clearly breached its contractual obligation by failing to complete the construction of the property by 23 November 1998 or any other promised dates. Even, as at the date of filing of the originating summons on 20 March 2003, the defendant had still failed to deliver vacant possession of the property.

[21] It is true that the plaintiff did not immediately decide to rescind the agreement after the defendant had failed to deliver vacant possession of the property on 23 November 1998. But, this is because after 23 November 1998, the defendant's officers had given assurances and promises that the property would be completed within other specific times, initially by the end of 2001 and later by the end of 2002. The plaintiff therefore decided to give the defendant more time to complete the property. But the defendant totally failed to keep its promise. In any event, the plaintiff is obliged to make progressive payments after receiving written notices from the defendant (cl. 3 of the agreement). If the plaintiff had failed to make any progressive payment, this would be regarded as a breach which entitles the defendant to terminate the agreement (cl. 5(1) of the agreement).

[22] For the aforesaid reasons, we unanimously upheld the decision of the learned High Court judge. We dismissed the appeal with costs. The deposit of this appeal was ordered to be paid to the plaintiff to account of its taxed costs.

Abdul Malik Ishak JCA:

Introduction

[23] I have read the judgment in draft of my learned brother Raus Sharif, JCA and I would like to add my own reasons for dismissing this appeal with costs.

[24] For convenience, the parties shall be referred to in the same manner as they were referred to in the High Court. The parties will be described as the plaintiff and the defendant accordingly.

Facts Of The Case

[25] By way of a sale and purchase agreement (hereinafter referred to as the "agreement"), the plaintiff (who was the respondent in this appeal) purchased at the price of RM1,149,771 a commercial shop lot (hereinafter referred to as the "property") developed by the defendant (who was the appellant in this appeal). That agreement was dated 24 August 1995 and by cl. 22(1) of the agreement, the defendant was required to deliver vacant possession of the property to the plaintiff 36 months from the date of the agreement (hereinafter referred to as the "completion date") and there was also an automatic extension of three months from the expiry of the completion date (hereinafter referred to as the "extended period").

[26] Calculation wise, the completion date expired on 23 August 1998 and the extended period expired on 23 November 1998. A

[27] The property was not completed nor delivered to the plaintiff by the extended period. In fact, on 20 March 2003 when the plaintiff filed the originating summons seeking for the principal relief of a declaration that the plaintiff had rescinded the agreement together with the other reliefs, the defendant had still failed to deliver vacant possession of the property. B

[28] On 27 December 2001, the plaintiff's former solicitors wrote a letter to the defendant informing the latter that the plaintiff had decided to rescind the agreement. C

[29] The plaintiff's former solicitors' letter dated 27 December 2001 also demanded payment of RM1,704,329.70 and the defendant said that this sum was an extortionate claim. D

[30] On 3 January 2002, the defendant by letter rejected the plaintiff's unilateral rescission of the agreement and averred that the plaintiff was only entitled to claim for liquidated damages.

[31] There were two significant episodes that have to be mentioned. Firstly, after the expiry of the extended period, the plaintiff's director by the name of Lee Teen Nguan met with the defendant's sale and marketing officers namely, Ms Esther and Ms Pey Yee and they promised that the property would be completed by the end of 2001. But, unfortunately, the defendant still failed to deliver vacant possession of the property to the plaintiff as promised. Secondly, again on 1 October 2002, Lee Teen Nguan met the defendant's sale and marketing officer by the name of Ms Dianne Chan and the latter gave an assurance that vacant possession of the property would be delivered by the end of 2002. Again, the assurance came to nought and the vacant possession of the property remain undelivered. E F G

[32] On 5 March 2003, the plaintiff's former solicitors wrote to the defendant's solicitors and requested the defendant to accept the plaintiff's rescission of the agreement and it also requested the defendant to give an undertaking to refund all the monies paid by the plaintiff as well as to settle any other damages sustained by the plaintiff within 14 days. H I

[33] On 10 March 2003, the defendant by letter rejected the plaintiff's request and categorically said, "Please be informed that the construction works of the project is nearing completion and we expect to hand over the property by July of this year."

[34] On 20 March 2003, the plaintiff filed the originating summons at the High Court registry after it obtained the consent and re-assignment of all rights, title and interests from the plaintiff's financier AmBank Berhad to institute legal proceedings against the defendant.

[35] On 30 June 2003, the property was completed and ready for delivery of vacant possession.

[36] On 1 July 2003, the plaintiff's financier AmBank Berhad paid on behalf of the plaintiff, the final 10% of the purchase price in the sum of RM114,977.10 to the defendant. This meant that the plaintiff had paid the full purchase price of the property.

[37] On 1 July 2003, the defendant sent a letter to the plaintiff notifying the latter to take delivery of vacant possession of the property.

[38] On 16 July 2003, the defendant issued an official receipt acknowledging payment of the final 10% amounting to RM114,977.10.

[39] The plaintiff had by their solicitors' letter dated 5 December 2003 refused to take vacant possession of the property pending the outcome of the originating summons application in the High Court.

[40] The delay in completing and delivering of vacant possession of the property calculated from the extended period of 23 November 1998 to 30 June 2003 would be four years seven months seven days.

[41] It must be borne in mind that cl. 32 of the agreement stipulates that time shall be of the essence in relation to all provisions of the agreement.

[42] The learned High Court judge gave judgment in favour of the plaintiff and the defendant filed an appeal to this court against that decision. We agreed with the decision of the learned High Court judge and unanimously dismissed the appeal with costs. The deposit of this appeal was ordered to be paid to the plaintiff to account of its taxed costs.

Analysis

[43] Five observations must be made here.

[44] Firstly, although the plaintiff had fulfilled its obligation by making those payments under cl. 3(1) of the agreement, yet the defendant failed to deliver vacant possession of the property on the completion date or on the extended period or on or before any other date as promised by the defendant.

[45] Secondly, the defendant held the views that the plaintiff was not entitled to rescind the agreement for late delivery of the property but rather the plaintiff was entitled to claim liquidated damages calculated from day to day at the rate of 12% per annum of the purchase price from the date of the expiry of the extended period up to the date of delivery of vacant possession of the property under cl. 22(2) of the agreement.

[46] Thirdly, it was never the defendant's case that the agreement was frustrated because of the delay in handing over vacant possession of the property to the plaintiff.

[47] Fourthly, because of the long delay in handing over vacant possession of the property, the plaintiff had no alternative but to file the originating summons before the learned High Court judge and sought for a declaration that the plaintiff was entitled to rescind the agreement as well as to seek a refund of the monies paid and to recover all damages suffered as a result of the defendant's breach under the agreement and, in addition thereto, to recover financing costs, legal expenses incurred by the plaintiff in purchasing the property as well as interest at the rate of 8% per annum on all sums to be paid from the date of the order to the date of full settlement together with costs of the application and incidental costs on a solicitor client basis to be paid by the defendant to the plaintiff.

[48] Fifthly, a declaration is a discretionary remedy and it is up to the court to grant it. The discretionary element was emphasised by Lord Sterndale MR in *Hanson v. Radcliffe Urban District Council* [1922] 2 Ch 490 at 507 in these salient words:

> ... the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide.

[49] The High Court judge granted the declaratory reliefs sought by the plaintiff and this court would only interfere if it can be shown that the learned High Court judge has exercised his discretion wrongly. Here, nothing was shown to us to merit our interference with the exercise of discretion by the learned High Court judge. Reasons were given by the learned High Court judge and those reasons showed that the discretion was not exercised in a selective and discretionary manner, and neither was it done arbitrarily or decided upon his own judicial whim (see the speech of Lord Diplock in *Cookson (Widow And Administratrix of the Estate of Frank Cookson, Decd) v. Knowles* [1979] AC 556, 565 HL). And Viscount Kilmuir LC in *Vine v. National Dock Labour Board* [1957] AC 488 at 500 rightly said that, "the discretion should not be exercised save for good reason".

[50] Here, the crucial issue for determination was whether the failure by the defendant to deliver vacant possession of the property on the completion date or on the extended period or on or before any other date as promised by the defendant constitutes a fundamental breach of the contract which entitles the plaintiff to rescind the agreement. In considering this crucial issue, it must be borne in mind that time has been made the essence of the contract. That being the case, s. 56(1) of the Contracts Act 1950 should be invoked and that section provides that failure to perform within a fixed time in a contract, where time is essential, would render the contract voidable.

[51] There is a Privy Council's case that goes by the name of *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* [1915] LR 43 IA 26 which held that the equipollent s. 55 of the Indian Contract Act (ours is s. 56 of the Contracts Act 1950) did not lay down any principle which differed from the equitable principles as set out in the English law relating to time in contracts for sale of a piece of land. In delivering the judgment of the board, Viscount Haldane had this to say at pp. 31 to 32:

> The law applicable to the point is contained in s. 55 of the Indian Contract Act, 1872, which provides that 'when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

> Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon v. Napper* [1802] 2 Sch. & Lef. 682, which was adopted by Knight-Bruce L.J. in *Roberts v. Berry* 3 D.M. & G. 284, at p. 289. The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley v. Thomas* L.R. 3 Ch. 61 and by the House of Lords in the recent case of *Stickney v. Keeble* [1915] A.C. 386. Their Lordships are of opinion that this is the doctrine which the section of the Indian statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley v. Thomas* L.R. 3 Ch. 61: 'The construction is and must be in equity the same as in a Court of Law'.

[52] Continuing at the same page and spilling over to p. 33, this was what Viscount Haldane said:

> Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

A But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract.

[53] The same approach was adopted by Edmonds JC in *Lai Yew Seong v. Wong Chieu Gook* [1913] FMS LR 125 when his Lordship said at p. 128 of the report:

D Section 55 of the Contract Enactment provides that whether time is or is not to be regarded as of the essence of a contract depends on what was the intention of the parties at the time they made the contract. This is an adoption of a principle of English Law and having regard to the way the English Courts of Law and Equity deal with covenants for payment of rent and re-entry conditions in leases I am of opinion that time is not of the E essence in this case.

[54] The headnote of the case of *Muhammad Habidullah v. Bird and Company* [1922] AIR 178 PC, merits reproduction. There it states as follows:

F The effect of s. 55 of the Act is, where the party having the option elects not to avoid, to put the agreement after the original date on the same footing as an agreement just before the original date. Where a specific time is stated, then that substituted date must hold. If there is a simple waiver of the right to extension of the original time, then a reasonable time will be the proper time G for delivery. Section 55, para. 3 means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time. In an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account H in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of goods.

[55] In *S Ayadurai v. Lim Hye* [1959] 1 LNS 89, Ismail Khan J I (as he then was) also adopted the view of the Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai (supra)*.

[56] Ibrahim Manan J, in *Ismail Haji Embong v. Lau Kong Han* [1970] 1 LNS 40, and Visu Sinnadurai J, in *Abdul Rahim Syed Mohd v Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners) And Another Action* [1996] 3 CLJ 393 dutifully applied *Jamshed Khodaram Irani v. Burjorji Dhunjibhai (supra)* in their judgments.

[57] Salleh Abas FJ speaking for the then Federal Court in *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 had this to say of s. 56 of the Contracts Act 1950:

> However, the rules contained in section 56 of the Contracts Act are not different from the position arrived at in common law. *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong* [1962] M.L.J. 118, 126. The position is this: If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion.

[58] Seah FJ, delivering the judgment of the then Federal Court had this to say in *Ganam Rajamany v. Somoo Sinnah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 in regard to time being the essence of the contract:

> In a contract for the sale of land the time fixed by the parties for completion or performance is not to be strictly construed unless it is the intention of the parties that time should be of the essence of the contract (see *Jamshed v. Burjorji* A.I.R. 1915 P.C. 83, *Stickney v. Keeble* [1915] A.C. 386, *Warren v. Tay Say Geok & Ors* [1965] 1 M.L.J. 44, and section 56(1) of the Contracts Act 1950]. Intention may either be express or implied and there are three cases in which time is of the essence of the contract.
>
> (a) where the contract expressly states that time shall be of the essence of the contract (*Steedman v. Drinkle* [1916] 1 A.C. 275 and *Brickles v. Snell* [1916] 2 A.C. 599).
>
> (b) where time was not originally of the essence of the contract but has been made so by one party giving a notice to the other. Such notice can only be given after the other party

A has been guilty of unreasonable delay and the time mentioned in the notice must be reasonable (*Stickney v. Keeble (supra)*).

(c) where from the nature of the property time may be considered to be of the essence of the contract (*Tilley v. Thomas* [1867] 3 Ch App. 61).

B

These three principles are cited by the then Court of Appeal in the case of *Haji Hasnan v. Tan Ah Kian* [1963] M.L.J. 175, 176. In *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong* [1962] M.L.J. 118, 120, the Privy Council said at page 120:

C

> The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances.

D

[59] I have said that time was the essence of the contract, and there was certainly delay on the part of the defendant to deliver vacant possession of the property. The delay was far too excessive and cannot be tolerated. When one considers s. 56(1) of the Contracts Act 1950, it must be read together with s. 65 of the same Act which provides for the consequences of rescission of a voidable contract. This was the approach adopted by Lord Hailsham LC in *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66, PC. This was what the Lord Chancellor said:

E

F

> Section 65 of the Ordinance (now the Contracts Act 1950) and section 64 of the Indian Act are to be found in that part of the statute which deals with the performance of contract and, as has been pointed out in several places, must be read closely in connection with section 39 (the effect of refusal of the party to perform the promise wholly) and section 56(1) (the effect of failure of a party to perform in a fixed time a contract in which time is essential).

G

[60] Since the defendant failed to deliver vacant possession within the stipulated time frame, the plaintiff was entitled to elect to treat the contract as coming to an end. This was the approach adopted by Lord Diplock in *Eng Mee Yong & Ors v. V Letchumanan* [1979] 1 LNS 18 and his Lordship said:

H

> Time being of the essence of the provisions in the Sale Agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end.

I

[61] Two letters were written by the plaintiff's former solicitors to rescind the agreement. The first was on 27 December 2001. The second was on 5 March 2003. That would be sufficient to bring an end to the agreement because time was the essence of the contract and the delay in delivering vacant possession of the property amounted to a fundamental breach or breach going to the root of the contract which entitled the plaintiff, as the innocent party, to rescind the agreement.

[62] The phrase "fundamental breach" has since been refined by Lord Diplock in *Photo Production Ltd v. Securicor Ltd* [1980] AC 827 at 849; [1980] 1 All ER 556 at 566, where his Lordship said that:

> ... the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract ... .

[63] Way back in 1838, the principles underlying both fundamental term and fundamental breach were well illustrated by Lord Abinger CB in the case of *Chanter v. Hopkins* [1838] 4 M & W 399 at 404, 150 E.R. 1484 at 1487 where his Lordship aptly said: "... if a man offers to buy peas of another, and he sends him beans, he does not perform his contract ... the contract is to sell peas, and if he sends him any thing else in their stead, it is a non-performance of it."

[64] The net result of finding that there has been either a breach of a fundamental term or a fundamental breach is this. That the innocent party or the party who is not in default may put an end to the contract - in the sense that any obligations then outstanding need no longer be performed by either party, and the innocent party too may sue for damages for any loss suffered as a result of the defaulting party's non-performance. The plaintiff here has done just that. Having rescinded the agreement, the plaintiff filed the originating summons and sought for all those reliefs and the learned High Court judge rightly granted those reliefs.

[65] The plaintiff was entitled to rely on s. 56(1) of the Contracts Act 1950 in rescinding the agreement notwithstanding the absence of an express provision in the agreement in regard to termination. The rescission of the agreement by the plaintiff did not deprive the plaintiff of its entitlement to liquidated damages arising out of the delay in delivering vacant possession of the property to the plaintiff.

[66] My learned brother Raus Sharif, JCA referred to *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 LNS 213, a decision of Abdul Malek bin Ahmad J, (as he then was), and *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471, a decision of mine, and I, likewise, would like to refer to these two cases.

[67] The case of *Chye Fook* dealt with late completion of a building where time was of the essence of the contract. And the specific question which Abdul Malek bin Ahmad J, (as he then was) had to answer in that case pertained to the question of whether the purchaser could sue for rescission on the agreement when the house was not completed on the completion date. On the options that were available to the purchaser, this was what his Lordship said:

> Section 56 of the Contracts Act 1950 states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter's failure to do the thing at or before the specified time. In this particular instance, I was of the view that the first limb of the section applied. Therefore, time was the essence of the contract and the contract was voidable. Consequently, since the building was not completed within 24 months from the date of the agreement, the purchaser plaintiff had the option either to continue with the contract or to rescind it.

[68] And in regard to liquidated damages, his Lordship had this to say:

> At this stage of the proceedings, this court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s. 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. I had in fact made it clear in my ruling that the plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

[69] While sitting on the High Court bench, in the case of *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd (supra)*, I had a rare opportunity to consider the same matter. In that case, by a sale and purchase agreement ("agreement"), the purchaser purchased

a house from the developer. The agreement adopted the version as found in Schedule "E" of the Housing Developers (Control and Licensing) Regulations 1982. The developer failed to deliver vacant possession of the house to the purchaser within the stipulated time frame in the agreement. The purchaser sought to terminate the agreement by sending letters of termination to the developer. The purchaser then filed an originating summons and prayed, *inter alia*: (i) for a declaration that the agreement had been properly terminated; (ii) that the developer must refund the money that had been paid by the purchaser; and (iii) that the purchaser was entitled to liquidated damages at the rate of 10% per annum of the purchase price from the date of delivery of vacant possession until the date of termination of the agreement. The developer conceded to prayers (i) and (ii), but argued that the liquidated damages as sought for should be rejected. The developer also argued that the right time for the purchaser to sue for liquidated damages would be when vacant possession was delivered because by then the sum to be paid could be ascertained and became due and that the limitation period would only be activated when vacant possession was delivered. In regard to time being the essence of the contract, this was what I said at p. 95 of the report:

> Since time is the essence of the S & P agreement, it is appropriate, at this juncture, to refer to s. 56(1) of the Contracts Act 1950 which enacts, *inter alia*, that where time is the essence of the contract, failure to perform within the stipulated time will entitle the injured party to avoid the contract. But the injured party has the right to elect not to avoid the contract but to insist on performance and sue for damages.

[70] I too spoke of the rights of the purchaser in this way (see p. 96 of the report):

> Applying the above principles to the present case, as time was provided to be of the essence of the S & P agreement, the stipulated time period within which the said house had to be delivered to the plaintiff became an essential condition of the S & P agreement. The failure of the defendant to fulfil this condition would entitle the plaintiff to have an option of treating the S & P agreement either: (a) as having been repudiated and sue for damages; or (b) as still continuing. The plaintiff rightly exercised his option to proceed under (a).

[71] Finally, on post-rescissionary damages, this was what I said:

> In addition to that, an order for post-rescissionary damages in favour of the plaintiff was also made, and these should be assessed by the senior assistant registrar by virtue of O. 28 r. 4 of the Rules of the High Court 1980 (see also *Tan Yang Long*'s case). Incidentally, the post-rescissionary damages (prayer 4 of encl 3) relate to the compensation which the plaintiff sustained through the non-fulfilment of the contract as envisaged under s. 76 of the Contracts Act 1950.

[72] Likewise here, the plaintiff was also entitled to post-rescissionary damages.

[73] It must be recalled that the plaintiff made progressive payments after receiving written notices from the defendant and such progressive payments were made in compliance with cl. 3(1) of the agreement. The plaintiff was obliged to made those payments and if the plaintiff failed to make any progressive payment, this would be construed as a breach that would entitle the defendant to terminate the agreement in accordance with cl. 5(1) of the agreement. Indeed that would be the stand of the defendant as reflected in the case of *Lim Yee Khei v. Berjaya Times Square Sdn Bhd* [2003] 1 CLJ 527.

[74] Finally, the regional economic crisis in 1997 and 1998 onwards cannot be an answer to the excessive long delay by the defendant in completing and delivering vacant possession of the property. The agreement did not specify nor envisage a situation where the defendant could delay the handing over of vacant possession on account of the economic crisis. Yet, the defendant now has the audacity to blame the long delay in handing over vacant possession entirely on the economic crisis ignoring completely its own ability and obligation to complete the property on the completion date or on the extended period or on or before any other date as promised by the defendant. To go a step further, even the economic crisis cannot excuse the plaintiff from paying the progressive payments under cl. 3(1) of the agreement.